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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EDWIN DARCELL TURNER, Defendant and Appellant.	B235057 (Los Angeles County Super. Ct. No. MA049674)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Affirmed.

William L. McKinney for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Edwin Darcell Turner, along with codefendants Kevin D. Wallace, Daqunn L. Tunstall, and Tony L. Hobson, was charged by information with two counts of premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a); counts 3 & 4), as well as firearm and gang allegations (§§ 12022.53, subds. (b), (c), 186.22, subd. (b)(5), (b)(1)(C)). Turner was additionally charged as a felon in possession of a firearm (former § 12021; count 5). The defendants were tried separately.[1]

In his first trial, Turner was convicted of possession of a firearm by a felon (count 5), but the jury deadlocked on the attempted murder counts (counts 3 & 4), and the court declared a mistrial. The attempted murder counts were retried to a second jury, and Turner was found guilty on both counts and all corresponding allegations were found true. (The jury was unable to make a unanimous finding for the premeditation allegations, however, and a mistrial was declared as to those allegations.) Turner was sentenced to 51 years 4 months in prison.

On appeal, Turner contends insufficient evidence supports the attempted murder counts and the gang enhancements, and that the videos played for the jury were not properly authenticated. He contends that if trial counsel failed to object to the admission of the videos, the failure to do so constituted ineffective assistance of counsel. Turner also contends that Detective O'Neal's testimony about calls made from jail and the courthouse lockup to one of the prosecution witnesses was inadmissible hearsay. Lastly, he claims cumulative error. Finding no merit in any of the above contentions, we affirm.

FACTS

On the night of May 12, 2010, at the Shadow Springs apartment complex in Palmdale, Turner and the codefendants approached L.J. as she walked to her car. They asked where she was going and asked for a ride to the convenience store. Because she was on her way to the convenience store, L.J. agreed to give them a ride. L.J. knew Turner and had seen the others before at the apartment complex.

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[1] Some background facts, concerning the identity and charges against Turner's codefendants, are taken from our unpublished opinion in *People v. Wallace* (Mar. 6, 2012, B233065).

As she drove up to the Chevron convenience store, L.J. saw a silver car pull in front of her and park in front of one of the pumps. She parked in one of the stalls in front of the store. Turner and his cohorts got out of the car. One of them told her to stay in the car. Turner waited outside, near the store's entrance, while the other three went inside the store.

As L.J. waited in the car, the two occupants of the silver car, John Does 1 and 2, walked by her car and went into the store. John Does 1 and 2 were in the store for less than a minute, and as they left the store, one of them "bumped" into Turner. John Does 1 and 2 asked Turner and his cohorts (who had also left the store), "Where are you from?" They answered "5th," and John Does 1 and 2 said they were from "BOP." At that point, it seemed to L.J. "like they were all going to get into a fight." John Does 1 and 2, and two of the men from Turner's group, put up their fists. L.J. did not want to be involved in a fight, so she put her car in reverse. She then heard "a few" gunshots coming from where the men had been standing. As she was backing up, three of the defendants jumped in her car. She returned to the apartment complex, and the three defendants got out of her car and ran in different directions.

L.J. moved from the apartment complex several weeks later because she was afraid. Sometime between the May 12 incident and her move, Turner approached her and told her "if anyone was to call [her] to say anything, to tell them [she] [did not] know anything" about that night.

At some point during the trial, L.J. gave her mobile phone number to defense counsel. One hour later, she received two voicemail messages, including a recorded message that an inmate from Los Angeles County jail was trying to contact her. She received similar calls over the next several days. She answered one of the calls and discovered that Turner was trying to contact her. She hung up on him.

Chevron security cameras recorded the incident, and the videos were played for the jury. Also, still photographs were taken from the videos, and L.J. identified Turner

and the other defendants as the people depicted in the photographs.[2] Los Angeles County Sheriff Gang Detective Richard O'Neal reviewed the surveillance videos and was able to identify Turner and the other defendants. The videos also depicted John Does 1 and 2. An audio recording of the incident captured an unknown male voice asking, "Where you from then?" Another voice asked, "Where the f--- you from," followed by two gunshots.

On September 13, 2010, Detective O'Neal interviewed Turner, who waived his *Miranda*[3] rights, and admitted he was at the gas station on the night of the shooting. The interview was recorded and transcribed for the jury. Turner initially denied being involved. But after watching the surveillance tapes, he admitted he asked John Does 1 and 2 "Where are you from?" because they were wearing attire associated with the Bloods on Point (BOP) gang and that a fight ensued. During the recorded interview, Detective O'Neal showed Turner a segment of the video where Turner chased John Does 1 and 2. The recording included Detective O'Neal's remark, "So there you are—clear as day—pointing and running. Shooting that gun at homie." Turner responded, "Nah, not shooting it." Turner told Detective O'Neal, "I tried to shoot it at the end, and I went to—I went back—actually no—actually I went back but it was handed to me afterwards." When Detective O'Neal pointed out that the video did not depict someone else handing the gun to Turner, he admitted, "No" and, "I've got a gun in my hand."

Detective O'Neal testified as a gang expert. He worked as a member of the sheriff's department gang unit for approximately six years. He investigated hundreds of gang-related crimes and conferred with gang detectives on many cases. Detective O'Neal regularly interviewed gang members, and received training through the sheriff's department on gangs and subcultures. He previously testified as a gang expert 14 times.

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2 The videos, photographs, and audio recordings are not part of the record on appeal, because Turner did not file a notice designating the exhibits in the Superior Court. Accordingly, we denied, without prejudice, his request to augment the record on appeal to include these exhibits. (Cal. Rules of Court, rule 8.224.) To the extent that the content of the exhibits is revealed by other sources in the record, we rely on those in summarizing the facts.

3 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Turner told Detective O'Neal that he was a member of the 40's Crips and Fifth Blocck Goons gangs. According to Turner, the Fifth Blocck Goons and BOP were rival gangs. Turner had "FBG" tattooed on his chest, referring to Fifth Blocck Goons. He also had tattoos of "5th" and "BOP" crossed out on his chest. Additionally, he had "YG," for young gangster, tattooed on his shoulders.

Detective O'Neal executed a search warrant at Turner's house, and found graffiti on a stair railing leading to his apartment reading "E-S 5th Blocck Goons, YG pop a flop." According to O'Neal, "E-S" stands for East Side and "pop a flop" refers to shooting BOP gang members, who are derisively called flops by rivals.

Detective O'Neal testified that East Side Fifth Blocck Goons is a newer gang. The gang was only a few years old, with approximately 30 members, and identified itself by the number "5" and "FBG." According to Detective O'Neal, when members of south Los Angeles gangs migrate to the Antelope Valley, they often form alliances or "clique up" with other gangs, while maintaining their allegiance to their home gang. That is how the East Side Fifth Block Goons were formed. The gang's territory is the Shadow Springs apartment complex. The primary activities of the gang include gun possession, assaults, and graffiti. Detective O'Neal had investigated other crimes committed by the East Side Fifth Blocck Goons. Another member of the gang had been found with a gun during a traffic stop. Detective O'Neal also personally observed gang vandalism and investigated the crimes from this case. Detective O'Neal testified that Turner had a March 10, 2010 conviction for gun possession.

After the shooting, Turner uploaded a rap song onto his MySpace profile, titled "Ya Don't Want It." In the song, Turner raps: "I'm a East Sider from the turf when I bang. Black and gray strings and the flops ain't a thing. I'm rolling through the hood blowing weed, swerving lanes. I'm for East Side Fifth, and I put on the game. Catch you at the Chevron, you niggas know what's happening. Run up on your bitch ass and get the gun clapping. You ain't no gang banger, you should've just stuck to acting. I'm chilling on the five with my niggas. Got my rag out the pocket, take the safety off my nine. We'll be waiting for you niggas . . . wasting time. While the homie yell Fifth, I'll be

running from behind. YG Smash banging with a passion. If a nigga ask, let 'em know I'm flop bashing. If you with the . . . no fade I'm blasting. That's five time . . . so why you niggas keep asking. . . . [¶] . . . [¶] . . . I'm B-O-P-K from the East Side by the way." According to O'Neal, "flop bashing" is bashing members of BOP, and "B-O-P-K" refers to BOP killer. Getting a "gun clapping" is to shoot a gun.

Detective O'Neal opined Turner was a member of East Side Fifth Blocck Goons because he was self-admitted, and because of his tattoos and postings on his MySpace profile.

In gang culture, asking someone where they are from is a challenge, resulting in violence. Bloods on Point and the East Side Fifth Blocck Goons are rival gangs.

Given a hypothetical based on the facts of this case, Detective O'Neal opined that the crime was committed for the benefit of and in association with a criminal street gang.

Detective O'Neal testified that he obtained L.J.'s phone number, and after searching jail and courthouse records, determined that two of the calls made to L.J. were made from the Antelope Valley Courthouse lockup, and eight others originated from the Men's Central Jail. Turner was present at these locations at times corresponding with the calls.

DISCUSSION

Turner contends there was insufficient evidence in support of the attempted murder counts and the gang enhancements, and that the videos played for the jury were not properly authenticated. Essentially conceding that no proper objection was made to the videos, he contends that any failure to object constitutes ineffective assistance of counsel. Turner also contends that Detective O'Neal's testimony about calls made from jail and the courthouse lockup to one of the prosecution's witnesses was inadmissible hearsay. Lastly, he claims cumulative error.

1. Attempted Murder

Turner challenges the sufficiency of the evidence for the attempted murder counts.[4] As best as we can discern from his brief, the basis of this claim is that the trial court erroneously admitted surveillance videos into evidence, and that without these videos, there was inadequate evidence to support his conviction. In a related argument, Turner contends that any failure to object to the videos constitutes ineffective assistance of counsel. We find no merit in any of these contentions.

Turner complains that the surveillance videos played for the jury were not properly authenticated. At trial, defense counsel objected that there was inadequate foundation for the videos. Specifically, as the videos were being played, Detective O'Neal was asked to identify a man depicted in the videos. Defense counsel objected "Lack of foundation at this particular point. It has not been laid." The objection was overruled. The video continued to play, and O'Neal was asked to identify a car depicted in the video. Defense counsel objected, stating "I'm going to have an ongoing objection with respect to him describing what and who[,] identification of vehicles and people. I don't believe this is the right witness for this." At sidebar, it was made clear that the substance of counsel's objections was to Detective O'Neal narrating the events in the videos. These are the only objections in the record. No objection appears when the People introduced the videos.

Assuming these objections are sufficient to challenge the authentication of the videos on appeal (*People v. Williams* (1997) 16 Cal.4th 635, 661; *People v. Chaney* (2007) 148 Cal.App.4th 772, 778), the objections were not well taken, and the videos were properly admitted into evidence. A film or other writing may be authenticated by "the introduction of evidence sufficient to sustain a finding that it is the writing that the

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[4] Turner's opening brief states that "[t]here was insufficient evidence to convict on any count," but only discusses the attempted murder counts. Accordingly, we treat any claim that the evidence was insufficient as to the firearm possession count as waived. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Stanley* (1995) 10 Cal.4th 764, 793 [A brief must contain reasoned argument and legal authority to support its contentions or the court may treat the claim as waived.].)

proponent of the evidence claims it is." (Evid. Code, § 1400; see also § 1401.) Two kinds of evidence are generally used to authenticate a film, including: (1) the testimony of a person who was present at the time a film was made, who can aver that it accurately depicts what it purports to show; or (2) expert testimony, indicating that the film is not a composite or fake. (*People v. Bowley* (1963) 59 Cal.2d 855, 859-860.) "Circumstantial evidence, content and location are all valid means of authentication." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.)

Here, there was sufficient evidence to authenticate the surveillance videos. Detective O'Neal testified that he received the videos from the Chevron's manager. Turner watched the videos during his taped interview with Detective O'Neal and confirmed that they accurately depicted him with a gun at the Chevron gas station. Also, L.J. identified Turner and his codefendants from still photographs taken from the videos on the night of the crimes.

The proper authentication of the videos is also dispositive of Turner's related claim that any failure to object to the videos constitutes ineffective assistance of counsel. "Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. [Citations.] This right 'entitles the defendant not to some bare assistance but rather to *effective* assistance.' [Citations.]" (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 466.) In order to demonstrate ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, *and* that he was prejudiced by counsel's performance. (*Id*. at pp. 466-467.)

As discussed *ante*, any objection would have been meritless, and therefore Turner cannot demonstrate prejudice. Furthermore, "'[t]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel.' [Citation.] If . . . the record fails to show why counsel failed to object, the claim of ineffective assistance must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or there can be no satisfactory explanation." (*People v. Mitchell*, *supra*, 164

Cal.App.4th at pp. 466-467.) Here, the record is silent as to defense counsel's reasons for not interposing a more specific objection to the videos, and therefore we will not guess at counsel's rationale (albeit the obvious reason is that the objection would have been meritless).

To the extent that we can construe Turner's brief as a challenge to the sufficiency of the evidence in support of the attempted murder counts, we find that ample evidence supports his conviction. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) The reviewing court's "opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 849.) Reversal is only warranted when it clearly appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin*, *supra*, at p. 331.)

"'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Attempted murder requires express malice, that is, the assailant either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.' [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1217.) "The act of shooting a firearm toward a victim at close range in a manner that could have inflicted a mortal wound had the shot been on target is sufficient to support an inference of an intent to kill." (*Id.* at p. 1218.)

Here, there was ample evidence supporting Turner's conviction. There was video and audio evidence that captured Turner engaged in a confrontation with two rival gang members, showed Turner with a gun, and captured the sound of it firing twice. Turner later posted a rap song admitting to the crime on his MySpace profile. He also admitted

to Detective O'Neal that he brandished a gun as recorded in the video, although he claimed he did not fire it. These facts adequately support the conclusion that he attempted to kill the rival gang members, John Does 1 and 2.

2. Gang Allegations

Turner next contends there was insufficient evidence to support the gang enhancement allegations because the People failed to prove that the East Side Fifth Blocck Goons gang was a street gang having as one of its primary activities the commission of one or more criminal acts described in Penal Code section 186.22, subdivision (e), whose members individually or collectively engaged in a pattern of criminal activity.

To prove a gang is a "criminal street gang," the prosecution must demonstrate it has as one of its "primary activities" the commission of one or more of the crimes enumerated in Penal Code section 186.22, subdivision (e), and it has engaged in a "pattern of criminal gang activity" by committing two or more such "predicate offenses." (§ 186.22, subds. (e), (f); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) " 'A pattern of criminal gang activity' " is defined as "the commission of . . . two or more of [the predicate offenses], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

It is well settled that expert testimony may be used to establish the elements of a gang enhancement. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223.) To qualify as substantial evidence, expert testimony must be based on reliable information. Police officers may base their testimony on conversations with gang members as well as information from colleagues and other law enforcement agencies. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 619-620; see also *People v. Martinez*, *supra*, at p. 1330; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370.)

Here, the People introduced evidence that Turner had a 2010 conviction for carrying a concealed weapon. In addition to that qualifying offense, the People relied on the current offenses to establish the predicate offenses. The current crimes are qualifying offenses under Penal Code section 186.22, subdivision (e). (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1383 [the currently charged offense can be considered as one of the predicate offenses in establishing a pattern of criminal gang activity].) Carrying a concealed firearm and attempted murder are qualifying predicate offenses under section 186.22, subdivision (e)(3) and (32). As for the gang's primary activities, Detective O'Neal testified that he had personal knowledge of vandalism and gun possession committed by other members of the gang, which are enumerated offenses in section 186.22, subdivision (e)(20) and (23), in addition to his knowledge of the offenses committed in this case. (*People v. Olguin*, at p. 1383.) Even though the gang was a relatively new gang, and law enforcement had not collected significant documentation of its activities, Detective O'Neal's gang expertise and investigations of the East Side Fifth Blocck Goons gang provide sufficient support for his opinion and for the jury's true finding. (See *People v. Martinez*, *supra*, 158 Cal.App.4th at p. 1330.)

3. Phone Call Evidence

Turner contends the trial court erred when it admitted Detective O'Neal's testimony, based on his search of inmate call records and inmate tracking information, that an inmate (the inference being that it was Turner) made phone calls to L.J. while in custody. At trial, defense counsel objected on both foundation and hearsay grounds. Respondent urges the phone records testified to are not hearsay, "[b]ecause it appears that Detective O'Neal was merely testifying to information he viewed regarding outgoing calls that had been automatically recorded by a computer or other machine, and not entered or recorded by an individual." (See *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1449-1450 [computer-generated data is not hearsay because it is not a "statement"; there is no possibility of a conscious misrepresentation by a machine].) We find that the People, as the proponents of the evidence, failed to establish a sufficient foundation for

the trial court to conclude that the statements fell outside of the hearsay rule. However, we find that any error in the admission of the evidence was necessarily harmless.

Detective O'Neal testified that there are records of calls placed from the county jail facility as well as the courthouse lockup, and that he was able to search those call records. The records show the specific phone used by the inmate, and the number dialed by the inmate. He also testified that based on his work experience in a custodial setting, inmates in custody are constantly tracked, and that he was able to review those tracking records to determine that Turner's locations corresponded to the calls made to L.J. However, Detective O'Neal did not discuss how these records were collected. Assuming the call records were automatically recorded by a computer, nonetheless, there was no evidence of how inmates are "tracked" and no basis on which to rest the inference that those records were automatically generated by a machine or memorialized in part or wholly by a deputy or deputies.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) A "'[s]tatement' means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (§ 225.) Courts have concluded that the hearsay rule applies to computer-*stored* statements but not computer-*generated* information, because computer-generated information is not a "statement" within the meaning of section 225, but information entered into a computer by a person is a statement. (See *People v. Nazary* (2010) 191 Cal.App.4th 727, 754-755; *People v. Hawkins*, *supra*, 98 Cal.App.4th at pp. 1449-1450.)

The records testified to by Detective O'Neal were offered to show that calls from the courthouse lockup or county jail were placed to L.J., and to prove Turner's presence in the courthouse or jail at the time the calls were made. Therefore, they were offered for the truth of the matters contained in the records. Whether these records are hearsay turns on whether Detective O'Neal was testifying to the content of log books written or manually entered into a computer by other deputies, or automatically generated computer

records. Even assuming the call records were automatically generated computer records, we know nothing about the records proving Turner was in the courthouse lockup or in county jail at the time the calls were made from those locations, because no foundational evidence of the nature of the writings was introduced by the People. (See Evid. Code, §§ 403, 405.) Moreover, no attempt was made to show that the records fell within any exception to the hearsay rule. (*In re Leanna W.* (2004) 120 Cal.App.4th 735, 743.)

Turner contends the error violated his Sixth Amendment right to confront the witnesses against him. However, not all erroneous admissions of hearsay violate the confrontation clause. The confrontation clause only applies to testimonial statements, and the statements at issue here were not testimonial. Rather, they are simply records of phone calls and inmate locations. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 812.)

Finding no constitutional violation, we conclude that any error in admitting the evidence was harmless. (*People v. Duarte* (2000) 24 Cal.4th 603, 619 [applying the *People v. Watson* (1956) 46 Cal.2d 818, 836-837 test for erroneous admission of hearsay evidence].) The testimony about the phone calls merely corroborated L.J.'s testimony that Turner had called her from jail and the courthouse lockup, which was ancillary to the issue of Turner's guilt of the charges of attempted murder. As discussed above, the evidence of his guilt for the attempted murder counts was overwhelming. There was also ample evidence of Turner's prior felony conviction, and that he possessed a firearm in this case. (Pen. Code, former § 12021.)

4. Cumulative Error

Having only found one harmless error, there are no errors to cumulate.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.